IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 9, 2007

# IN RE B.S.G.

**Appeal from the Juvenile Court for Hamblen County**
**No. 13623 Floyd W. Rhea, Judge**

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**No. E2006-02314-COA-R3-PT - FILED MAY 24, 2007**

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The trial court terminated the parental rights of G.G. ("Mother") with respect to her minor child, B.S.G. (DOB: February 2, 2004) ("the child"), upon its finding – said to be by clear and convincing evidence – that grounds for termination existed and that termination was in the best interest of the child. Mother appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Scott A. Hodge, Morristown, Tennessee, for the appellant, G.G.

Robert E. Cooper, Jr., Attorney General and Reporter, and Amy T. McConnell, Assistant Attorney General, General Civil Division, for the appellee, State of Tennessee Department of Children's Services.

## OPINION

I.

The Department of Children's Services ("DCS") removed the child from the custody of Mother shortly after her birth. DCS's petition requesting temporary custody of the child provides as follows:

> It is upon Petitioner's information and belief that [the child] is a dependent and neglected child within the meaning of the law in that the Department received a referral stating . . . [that] the mother of the minor child[] had given birth to the minor child and was reporting to the child's biological father that the minor child was dead. The

> mother was unable to supply this worker with the full name of the biological father and had to ask her older adult daughter what the biological father's first name was. The mother insisted on delivering the baby vaginally, although she suffers from herpes and a vaginal birth unnecessarily exposed the minor child to the virus, which is incurable. Future testing will be necessary to determine whether or not the baby has contracted the disease.[1] While the infant and the mother were in the hospital following the delivery, the mother was responsible for the care and feeding of the infant. On February 4, 2004, the baby was reportedly brought to the mother at 9:00 a.m. in [the] morning. When the child was retrieved from the mother at approximately 1:15 p.m., the mother had only fed the infant 1 oz. of formula and she stated that she had not changed the baby's diaper at all.
>
> The minor child's four older siblings were removed from the mother's custody in February 2002 and remain in foster care. At least one of the older siblings had been removed previously from the mother's custody. The mother has had her parental rights terminated to two other children.

(Footnote added). The child was placed in the care of her current foster parents when she was six months old. The foster parents have expressed their desire to adopt the child.

Mother has a total of nine children, several of whom have been in the custody of DCS at one time or another. At the time of the hearing in this case, Mother's parental rights as to three of her children had been terminated. Mother has custody of her 16-year-old daughter, J.H., and her 13-year-old son, A.R.G. These two children and Mother reside with Mother's 21-year-old daughter, V.H. Mother testified that she takes care of V.H.'s infant child when V.H. is at work and on the weekends. V.H. testified that she did not have any problem leaving her child with Mother and felt confident that Mother could take care of her child.

In March 2004, Mother was evaluated by Dr. Alice Garland, a senior psychological examiner. Dr. Garland found that Mother possessed a full-scale IQ of 58, which places her in the mild range of mental retardation. Dr. Garland also diagnosed Mother with "depressive disorder" and "dependent personality disorder." Significantly, Dr. Garland found Mother to be overly dependent on males. Dr. Garland's report notes that Mother reads at a 1st grade level and is therefore unable to obtain information by reading. The report also states that Mother tested "extremely poor in ability to reason, to make good judgments about her life, to accurately understand what is happening in her environment, and in her ability to see how past and present behavior impact [] the future." Dr.

[1] The record is silent as to whether such testing was ever conducted. However, the DCS caseworker assigned to the case testified that he was not aware of a manifestation of herpes in the child.

Garland also noted that Mother refuses to take any responsibility for her children being in foster care and for some of her children being abused by the males in her life.

Dr. Garland's report further notes that, due to Mother's low IQ, her capacity to make changes is severely limited. The report states that insight-oriented therapy is likely to be of little benefit to Mother. The report also states that Mother needs a stronger support system and ongoing monitoring to ensure that any child left in her care is safe. Dr. Garland recommended that Mother live in a housing facility that provides 24-hour-a-day, 7-day-a-week staffing. She knew of one such facility in Knoxville. During her deposition, Dr. Garland stated that, at the very least, Mother would require outside monitoring every other day. Though Dr. Garland stated that this "could be a possible situation" for Mother, she was not certain that it would work in Mother's case.

In May 2004, the trial court found the child to be dependent and neglected

> due to [M]other's continued poor judgment evidenced by her insistence upon a vaginal delivery of the minor child in spite of the fact that [M]other, who suffers from herpes, was warned by her obstetrician that a vaginal delivery could result in the death of the child if the minor child was exposed to the herpes virus and [M]other's inability to provide appropriate and adequate care and supervision for the minor child and [M]other's failure to effect a substantial change in the circumstances which resulted in the removal of the minor child's siblings, who are still in the custody of the Department, in spite of efforts made by the Department over a two year period to reunify the family.

During the two years following the removal of the child, DCS caseworker Douglas Masengill arranged for Mother to receive many services, including counseling, community programs to enhance her self-esteem and social skills, parenting and bonding assessments, and therapeutic visits with the child. Mother saw the child on a weekly basis. The visits, which typically lasted two and a half hours, were supervised by Mr. Masengill and, in the beginning, a therapeutic visitation specialist. Mr. Masengill testified that he was unable to provide the constant monitoring recommended by Dr. Garland because it was not available in the Morristown community. He also testified that there was no community resource that would provide the daily or even the every-other-day monitoring recommended by Dr. Garland.

The child suffers from several ailments and problems that require special attention. She has severe allergies that affect her skin and breathing. She is allergic to any diaper that is not a "Huggies" brand diaper. Mother testified that she was told on several occasions that the child had to wear "Huggies" to prevent blistering around her bottom area. She further testified that she only used "Huggies" on the child. Contrary to Mother's testimony, Mr. Masengill, the CASA caseworker assigned to the child's case, the child's foster mother, and the child's daycare provider each testified that the child would frequently return from visits with Mother wearing the wrong brand of diaper.

The child has also been diagnosed with developmental disorders affecting her speech and motor skills. To treat these disorders, the child attends speech and occupational therapy. The child also attended physical therapy for approximately six months to address the "turning in" of one of her feet. The trial court ordered Mother to attend all of the child's speech, occupational, and physical therapy sessions. Mr. Masengill testified that he personally informed Mother of all of the child's appointments. He also stated that he referred Mother to several local resources for transportation to these appointments. Mother testified that she missed at least six or seven speech therapy sessions and half of the physical therapy sessions "[f]or her foot." She stated that she missed these sessions because she either had a sore throat or a virus. Mother could not recall the names of the child's therapy providers.

The child's speech therapist, Kimberly Cole, testified that Mother came to approximately 70% of her sessions with the child. When a new therapy concept for the child was introduced, Ms. Cole asked both Mother and the child's foster mother to participate in the session. When Ms. Cole worked with the child one-on-one, after the session she would explain to Mother and the foster mother what the child had learned that day. Ms. Cole testified that it is integral to the child's improvement that the lessons be reinforced at home. She stated that she instructed Mother and the foster mother on exercises that they needed to do with the child at home. She also stated that, when she was sharing information with Mother and the foster mother, Mother "would [frequently] walk away and the foster mother would remain and get all the information that she could." Ms. Cole testified that Mother never asked questions about the child's progress or inquired as to how she could help the child progress at home.

The child's occupational therapist, Virginia Burton, described similar communication problems with Mother. According to Ms. Burton, parents and caregivers are generally not allowed to stay in the room during therapy sessions; therefore, after each session, Ms. Burton would explain what had been done in the session and what needed to be done at home to continue the child's improvement. Ms. Burton stated that Mother would often "turn away" while she was explaining things to her. Ms. Burton also stated that Mother was not able to discuss or explain what was being communicated to her.

On April 17, 2006, DCS filed a petition to terminate the parental rights of Mother based on the ground of persistent unremedied conditions. *See* T.C.A. § 36-1-113(g)(3) (Supp. 2006). At the conclusion of the hearing in this case, the trial court rendered its oral opinion terminating Mother's parental rights. That opinion, in pertinent part, provides as follows:

> The evidence establishes that [Mother] is mildly mentally retarded with a full scale IQ of 58 and she has a history of depression.
>
> Other mental conditions render her a very poor person to make judgments, especially regarding men. She does not even know th[e

child]'s father's full name and has given different individuals different names regarding who the biological father[2] is.

The fact that she is limited does result in the Court's finding that she would be unable, most likely, to care for [the child]'s special needs. The child needs occupational therapy and speech therapy on a continuing basis for an extended period of time.

The fact that I ordered you, [Mother], to go to all these meetings, these therapy sessions, your daughter[, V.H.,] indicated that she was always available to take you; and the fact that Mr. Masengill identified various local transportation sources, free of charge, I do not understand why you did not become more involved.

Your attorney has done a very good job. He argues that you have done everything in the Parenting Plan. Well, the main thing is that you learn these skills to be able on a day-to-day basis to care for [the child]'s needs.

She is a child that has been prescribed Albuterol four times a day and other respiratory medicine. That indicates to the Court that she has a severe respiratory ailment that could be life threatening.

She has multiple allergies. You don't even know what those are. You have never gone to the allergist. You continue to put an allergen on her skin every time you put her in a diaper that is not a Huggies. I find that has happened numerous times and that your testimony to the contrary is not credible.

These factors cause the Court grave concerns that the child will be neglected.

I am not concerned that the child would be abused. I know you love [the child]. The statute has to be applied and I have to apply it objectively and without emotion.

This is a difficult case. . . . Mr. Masengill is conflicted because he knows you love your daughter and he knows you have done the best you can.

[2]The record does not reflect whether the parental rights of the child's father have been terminated.

> It is an unfortunate circumstance that [the child] has special needs that the Court finds by clear and convincing evidence that you cannot meet. The conditions cannot be remedied because your limitations are not such that you can fix them. I know you would if you could.
>
> As far as the best interest of [the child], she is in the only home she has ever known. The [foster parents] love her and she loves them. They are caring for her needs on a day-to-day basis and she is making good strides regarding her speech and her physical situation. She needs to be in that environment on a day-to-day basis where her occupational therapy and her speech therapy can be reinforced. As [the foster mother] testified, that is a daily activity; and the stretching for her foot that was turning in is a daily activity after her bath. Those are very important.
>
> [The child] is two and a half years old, and the gap between her and a normal child in development has to be bridged for her to succeed at her highest and best situation she can reach.
>
> I do not take any pleasure in making this ruling, but my job is to determine if the burden of proof from the Department has been met and if it is in [the child]'s best interest for her to be adopted by the [foster parents]. I conclude that it is.

(Footnote added). On October 3, 2006, the trial court filed a final judgment terminating Mother's parental rights. Mother appeals that judgment.

II.

The law is well-established that "parents have a fundamental right to the care, custody, and control of their children." ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing ***Stanley v. Illinois***, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)). This right, however, is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. ***Santosky v. Kramer***, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). In Tennessee, a party that seeks to terminate another party's parental rights must first prove the existence of a statutory ground for termination. T.C.A. § 36-1-113(c)(1). The party seeking termination must then prove that termination of parental rights is in the child's best interest. ***Id.*** at (c)(2). Both of these elements must be established by clear and convincing evidence. ***Id.*** at (c)(1); ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002). Clear and convincing evidence is evidence which "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." ***O'Daniel v. Messier***, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

III.

The Supreme Court recently reiterated the standard of review for cases involving termination of parental rights:

> This Court must review findings of fact made by the trial court *de novo* upon the record "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). To terminate parental rights, a trial court must determine by clear and convincing evidence not only the existence of at least one of the statutory grounds for termination but also that termination is in the child's best interest. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). Upon reviewing a termination of parental rights, this Court's duty, then, is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

***In re F.R.R., III***, 193 S.W.3d 528, 530 (Tenn. 2006).

IV.

Mother presents three basic issues on appeal. She argues that the trial court erred in finding (1) that there is clear and convincing evidence establishing a ground for the termination of her parental rights; and (2) that there is clear and convincing evidence establishing that termination is in the child's best interest. Mother also raises the issue of whether DCS made reasonable efforts to reunite her with the child. We will address each issue in turn.

V.

Mother first takes issue with the trial court's finding that clear and convincing evidence establishes a ground for the termination of her parental rights.

The statutory grounds for terminating parental rights are found at T.C.A. § 36-1-113(g). The trial court relied upon subsection (g)(3) as its ground for termination in this case. That provision authorizes the termination of parental rights when

> The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:
>
> (A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the

> child's safe return to the care of the parent(s) or guardian(s), still persist;
>
> (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
>
> (C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

No one disputes that the child had been removed from Mother's home for more than six months. *See* T.C.A. § 36-1-113(g)(3). The child was taken into the custody of DCS shortly after birth. At the time of the hearing below, the child was two and a half years old.

Mother argues that the trial court erred in finding that clear and convincing evidence establishes this ground for termination because, according to her, she met "all her requirements and [did] everything DCS asked her to do." We do not dispute the fact that the evidence supports a finding that, for the most part, Mother did what DCS asked her to do. Mr. Masengill specifically testified that Mother had done everything that he had asked of her. However, we do not agree that this fact somehow excluded the trial court from finding that persistent unremedied conditions exist pursuant to T.C.A. § 36-1-113(g)(3).

The persisting conditions in this case are twofold – (1) a child with a multitude of special needs and (2) a parent with serious mental limitations. The child has developmental delays that require constant at-home reinforcement, reinforcement which the child's therapists feel Mother is incapable of understanding and performing. Mother failed to demonstrate that she understands that the child has a severe diaper allergy and requires a certain brand of diaper. Dr. Garland testified that Mother's ability to cope with everyday living was "extremely poor," and that she did not have the "ability to make good judgments, to reason things out, to . . . get an overview of what's going on in her world, [and] to think . . . if I do this that might cause some problems down the road for me." She also testified that the only way Mother could successfully parent the child, especially considering the child's special needs, is with a stronger support system and constant monitoring.

Mother also argues that the trial court "improperly place[d Mother]'s mental limitations under the grounds of persistent conditions." She states that "the legislature did not intend to include mental impairments/limitations under the umbrella of persistent conditions because they made a separate and distinct section for that specific ground." *See* T.C.A. § 36-1-113(g)(8). We disagree with this argument.

T.C.A. § 36-1-113(g)(8) specifically provides a ground for the termination of parental rights when a parent's mental condition is so impaired that it is unlikely that the parent will be able to properly care for the child in the near future. *See* ***id.*** Given the facts in this case, it does appear that DCS *could have* petitioned to terminate Mother's parental rights based upon subsection (g)(8).

However, we do not agree that the mere existence of subsection (g)(8), or the fact that (g)(8) is implicated by the current set of facts, excluded the trial court from basing a finding of persistent unremedied conditions on Mother's mental impairments/limitations. A parent's mental incapacity can provide a sufficient factual predicate for a finding that persistent unremedied conditions exist which prevent the safe return of the child or children to that parent's care. *See e.g.*, ***Dep't. of Children's Servs. v. B.J.A.L.***, No. E2002-00292-COA-R3-JV, 2002 WL 31093932, at *6 (Tenn. Ct. App. E.S., filed September 19, 2002); ***In re C.J.S.***, No. M2000-02836-COA-R3-JV, 2002 WL 256799, at *4-5 (Tenn. Ct. App. M.S., filed February 22, 2002); ***In re T.S. & M.S.***, No. M1999-01286-COA-R3-CV, 2000 WL 964775, at *6-7 (Tenn. Ct. App. M.S., filed July 13, 2000).

It is apparent from the testimony that Mother has mental limitations which prevent her from learning the skills necessary to care for the child and address the child's special needs. We find that there is clear and convincing evidence to support the trial court's finding that these conditions are unlikely to be remedied in the near future and that the continuation of Mother's legal relationship with the child will greatly diminish the child's chances of an early integration into a stable home environment. *See* T.C.A. § 36-1-113(g)(3).

VI.

Mother next contends that the trial court erred in its finding, said to be by clear and convincing evidence, that terminating her parental rights was in the child's best interest.

The factors that a trial court must consider when determining whether the termination of parental rights is in the best interest of a child are set forth in T.C.A. § 36-1-113(i), which provides, in pertinent part, as follows:

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
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> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

This list is "not exhaustive," and there is no requirement that every factor must appear "before a court can find that termination is in a child's best interest." ***Dep't. of Children's Servs. v. T.S.W.***, M2001-01735-COA-R3-CV, 2002 WL 970434, at *3 (Tenn. Ct. App. M.S., filed May 10, 2002).

Mother has not been able to improve her mental condition to the point where she can understand how to effectively parent the child, particularly considering the child's special needs. *See* T.C.A. § 36-1-113(i)(1). Furthermore, Mother's capacity to make changes is limited due to her low IQ. *See* ***id.*** at (i)(2).

Mother has maintained regular visitation with the child. *See* ***id.*** at (i)(3). Mr. Masengill testified that, during Mother's visits with the child, "they hug and exchange, as a mother and child would." *See* ***id.*** at (i)(4). The child has been in foster care since birth. *See* ***id.*** at (i)(5). The child's foster parents are interested in adopting the child and have gone to great lengths to provide adequate care for the child and treatment for the child's medical and developmental conditions. A change in caretakers at this time, *i.e.,* returning the child to the care of Mother, would likely have a profoundly negative psychological, emotional, and physical impact on the child. *See* ***id.***

Mother has lived with men who have physically and sexually abused some of her other children. *See* ***id.*** at (i)(6). Mother currently resides with her daughter, V.H., whom, as Dr. Garland noted in her report, also has "intellectual limitations." *See* ***id.*** at (i)(7).

It is clear from the record that Mother's mental limitations prevent her from effectively providing safe and stable care for the child. *See* ***id.*** at (i)(8). Mother does not understand the child's special needs or how to treat them. To regain custody of the child, Mother would require constant

monitoring from an outside source, monitoring which is not available in the community. To our knowledge, the trial court did not address the issue of child support, and there is no specific evidence in the record before us regarding this matter. *See* ***id.*** at (i)(9).

We conclude that the evidence contained in the record does not preponderate against the trial court's finding that there is clear and convincing evidence that the termination of Mother's parental rights is in the best interest of the child.

VII.

Mother also argues that her parental rights should not have been terminated because DCS failed to make reasonable efforts to reunite her with the child. She specifically cites the fact that (1) DCS never permitted her to have an overnight visit or a trial home placement to prove that she could properly parent; and (2) DCS did not "focus[] their efforts on finding the type of [monitoring] service as described by Dr. Garland."

This Court has previously held that, with respect to the reasonable efforts of DCS in a termination case, the code provision is T.C.A. § 36-1-113(i)(2).[3] *See* ***In re A.W.***, 114 S.W.3d 541, 545 (Tenn. Ct. App. 2003). "The statute does not require a herculean effort on the part of DCS," but rather that DCS "make 'reasonable efforts.'" ***State Dep't of Children's Servs. v. Malone***, No. 03A01-9706-JV-00224, 1998 WL 46461, at *2 (Tenn. Ct. App. E.S., filed February 5, 1998).

DCS did not provide, or allow for, the services and accommodations cited by Mother. Mr. Masengill testified that a trial home placement is appropriate only where there is no immediate concern for the child's safety. He stated that he never felt comfortable with the idea of a trial home placement in this case "because [] the father [was] still in the neighborhood." He also stated that DCS never provided the monitoring services recommended by Dr. Garland because, as we have already mentioned in this opinion, such services were not available.

However, the record supports a finding that DCS made reasonable efforts to aid Mother in developing the skills necessary to have the child returned to her. DCS arranged Mother's evaluation with Dr. Garland and subsequent mental health counseling. DCS enrolled Mother in community programs to enhance her self-esteem and social skills. DCS notified Mother of all of the child's

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[3] T.C.A. § 36-1-113(i)(2) reads as follows:

> In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:
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> * * *
>
> Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonable appear possible[.]

therapy appointments and provided her with information regarding transportation resources. Furthermore, DCS arranged parenting/bonding assessments and therapeutic visits for Mother and the child. Given this proof, we conclude that the evidence does not preponderate against the trial court's finding that DCS made reasonable efforts to reunite Mother with the child.

VIII.

This is a very sad case. It is clear that Mother, to the extent she has the capacity to do so, loves the child. However, it is also clear that Mother cannot effectively take care of the child and the child's special needs. Because we find that a ground for the termination of Mother's parental rights has been proven by clear and convincing evidence and that it has been shown, again by clear and convincing evidence, that it is in the best interest of the child for Mother's rights to be terminated, we affirm the trial court's judgment.

IX.

The judgment of the trial court is hereby affirmed. This case is remanded for the enforcement of that court's judgment and for the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, G.G.

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CHARLES D. SUSANO, JR., JUDGE